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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 268

DANIEL J. LEARY and SADIE D. LEARY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on March 5, 1964.

OPINIONS BELOW

The opinion rendered by the United States District Court for the District of Connecticut was rendered on May 21, 1963 and is set forth in the Appendix (31a) made a part hereof and otherwise reported in 228 F.Supp. 467.

The per curiam opinion of the United States Court of Appeals for the Second Circuit was rendered on March 5, 1964, and is reported in 330 Fed. (2nd) 497 and is also set forth in the Appendix (1a, 2a) and made a part hereof.

A motion for rehearing made by the petitioners in the United States Court of Appeals for the Second Circuit was denied on April 13, 1964 (Trans. for Second Circuit page 33A) and also set forth in Appendix (3a) to this petition at page . .

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Rule 56(b)(c)(d)(e)(f), of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED

1. That the United States District Court for the District of Connecticut erred in granting summary judgment because of the fact that there remained disputed facts in the case that should have been adjudicated by trial and said decision and the affirmance thereof by the United States Court of Appeals for the Second Circuit is at variance with Rule 56 of Federal Rules of Civil Procedure and adjudicated cases by this Court and other Federal jurisdictions.

2. That the United States District Court for the District of Connecticut erred in determining that the plaintiff (the Government) below was entitled to summary judgment without a hearing first had on certain disputed facts, because said decision by the United States District Court for the District of Connecticut was at variance with the provisions of Rule 56, Federal Rules of Civil Procedure; that the affirmance of said action by the aforesaid District Court by the United States Circuit Court of Appeals for the Second Circuit was likewise in error and contrary to adjudicated cases of this Honorable Court and other Federal Circuit Courts.

3. That the aforesaid decision of the District Court and affirmance thereof by the United States Court of Appeals

for the Second Circuit was in violation of the due process provision of both the Fifth and the Fourteenth Amendments to the Constitution of the United States in that it accomplished a forfeiture against the petitioners without due process.

CONSTITUTION

Due Process—5th, 6th and 14th Amendments.

STATUTES INVOLVED

Title 26 U.S.C.A. 6212(c)(1):

> "General rule. If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments)."

Title 26 U.S.C.A. 6213(a):

> "Time for filing petition and restriction on assessment. Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A

or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court".

Title 26 U.S.C.A. 6322:

"Period of lien. Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68a Stat. 779."

Title 26 U.S.C.A. 7442:

"Jurisdiction. The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879."

See historical note.

RULES OF COURT

Tax Court of U.S. Rule 7(a)(1)(2):

"(a) Petition

(1) Filing. A Case shall be initiated by filing with the Court a petition consisting of an original and 4 complete, accurately conformed, clear copies, either printed or typed (See Rules 4 and 6).

(2) Improper petition—Dismissal. Failure of a petition to comply with this Rule or with Rule 4 or 6 shall be ground for dismissal of the case.

See also section 6213(a), and section 7502, Code of 1954, in regard to absolute statutory time limit on filing."

Tax Court of U.S. Rule 27(c)(3):

"Attendance at trials. The unexcused absence of a party or his counsel when a case is called for trial will not be the occasion for delay. The case may be dismissed for failure properly to prosecute or the trial may proceed and the case be regarded as submitted on the part of the absent party or parties."

Tax Court of U.S Rule 31(a) and (g):

(a) "Rules applicable—The trials before the Court and its Divisions will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia. With reference to the examination of unwilling or hostile witnesses, see Rule 43(b) of the Rules of Civil Procedure for the United States District Courts.

(g) "Failure of proof—Failure to adduce evidence in support of the material facts alleged by the party having the burden of proof and denied by his adversary may be ground for dismissal."

Federal Rules of Civil Procedure Rule 56(c):

"Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if *the pleadings, depositions, and admissions on file, together with* the affidavits, if any, *show that there is no genuine issue as to any* material fact and that the moving party is entitled to a judgment as a matter of law.

A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948" (emphasis supplied).

Rules of Civil Procedure U.S. District Court (Conn.), Rule 15:

"Dismissal of Actions for Failure to Prosecute. In civil actions in which no action has been taken by the parties for one year, the clerk shall give notice of proposed dismissal to counsel of record on or before the first of September in each year. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the court within thirty days thereafter, the clerk shall enter an order of dismissal. Any such order entered by the clerk under this rule may be suspended, altered, or rescinded by the court for cause shown."

Rules for U. S. District Court for the District of Columbia, Rule 13:

"Dismissal without Prejudice; Notice of; Warning. If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or take action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint, counterclaim, cross-claim, or third party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry".

STATEMENT OF THE CASE

Petitioners Daniel J. Leary and his wife Sadie D. Leary on June 7, 1940 received notice by registered mail of alleged deficiency on taxes for the years 1934 and 1935 and the petitioner Daniel J. Leary on June 7, 1940 received notice by registered mail of alleged deficiency on taxes for the year 1933. Subsequent to the tax years (1933, 1934 and 1935) but before the assessments (*supra*), in May 1938 the petitioner Daniel J. Leary, then a City of Waterbury official, and others were charged in the Superior Court of Connecticut with the criminal offense of conspiracy to defraud. The petitioner and others were duly tried and convicted and appealed that conviction to the State Court of Appeals. The conviction as to the petitioner and some others was affirmed; 18 A.2d 895, 127 Conn. 543.

Apparently this trouble brought on the tax investigation and the alleged deficiencies (*supra*) which were sent by registered mail on June 7, 1940, a short time before the conviction in the criminal case.

Following the registered notices of assessments aforementioned on October 9, 1940 petitions were filed in the Board of Tax Appeals in behalf of the petitioners herein (see Complaint 1707 and 1708—App. (22a-26a)

It was contended on behalf of the petitioners at the hearings on the Motion for Summary Judgment that the Board of Tax Appeals' decisions were void because the petition had not been filed within ninety days as provided by the Revenue Code and also by rule of the Board of Tax Appeals (now the Tax Court).

The District Court trial judge in the face of this point raised by the petitioners asked the attorneys for respondent if they desired time to amend the complaint. Respondent counsel answered that they would like time to amend. The trial judge continued the hearing on the Motion for

four weeks (App. Actually the adjourned hearing was not had until April 22, 1963 (App. 12a) at which time no amended pleadings were filed as to the point raised (*supra*). The respondent did offer in evidence affidavits from representatives of the Internal Revenue Bureau which were improperly received on a Motion for Summary Judgment. The respondent also presented a photostatic copy of the docket entries for the Tax Court which were likewise improperly received on a Motion for Summary Judgment. After the adjourned hearing held on April 22, 1963 the trial judge took the matter under advisement and on May 17, 1963 granted the Motion for Summary Judgment on cases 626, 1707 and 1708 consolidated (App.

The case of *State* v. *Hayes et al.*, 18 Atl. 2d 895, 127 Conn. 543 was decided on March 4, 1941 and immediately following that decision the petitioner Daniel J. Leary left the jurisdiction and returned some time in early 1946.

The petition in the Board of Tax Appeals was not put down for hearing until November 1944 at which time the petitioner Daniel J. Leary was still absent. The individual who had filed the petition in the Board of Tax Appeals did not appear at the hearing and at the outset the hearing officer was advised by counsel for the Internal Revenue Bureau that he had received a communication from the individual who had filed the petition on behalf of the petitioners advising that he would not be present because he had not been able to confer with the petitioner and had no documentary evidence available to him at that time. The hearing officer insisted that the hearing be had and announced that proceedings would be instituted to disbar the record representative (an accountant—not a lawyer) of the petitioner Daniel J. Leary and such proceedings were subsequently instituted and the individual was disbarred. The details of this situation are set forth at the outset of the hearing officer's opinion starting at page 115 1945 T.C. Memorandum Decisions.

At the hearing on the Motion for Summary Judgment counsel for the petitioners urged to the Court that the decision of the Board of Tax Appeals was void not only for the reasons heretofore indicated (*supra*) but for the additional reason that proceeding in the absence of the petitioner accomplished a forfeiture without due process as contemplated by the Constitution of the United States.

REASON FOR GRANTING WRIT

The petitioners assert that a Writ of Certiorari should be granted in this case under Rule 19(b) of this Court, because the United States Court of Appeals for the Second Circuit has rendered the decision affirming a judgment of the United States District Court for the District of Connecticut, the effect of which is to sanction a departure from the accepted and usual course of judicial proceedings by the Trial Court so as to call for an exercise of this Court's power of supervision.

ARGUMENT

1. That the District Court erred in granting Summary Judgment because of disputed facts in this case.
2. That the District Court erred in determining that the respondent below was entitled to judgment without a hearing first had on said disputed facts.

The petitioners believe that the suggested errors committed by the Trial Judge, add up to the conclusion that the petitioners were denied due process under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and therefore the assignments will be discussed as one.

At the outset it must be borne in mind that the Motion for Summary Judgment under consolidated cases 626, 1707 and 1708 presented the clear cut question as to

whether the petitioners were entitled to be heard under circumstances that they might have disputed the contentions that were being made.

It is respectfully urged to this Court that on the consolidated Motion for Summary Judgment below there were issues of fact and Law that remained to be determined and should not be passed over by the preemptory granting of the Motion for Summary Judgment.

Remember we must that the basis of this litigation had its inception back in 1933-4 and 5 touching the Federal Income Tax returns made by the petitioners for those years and suggested deficiencies in connection therewith.

The deficiencies urged by the Internal Revenue Bureau of the United States were first brought to the attention of the petitioners on October 9, 1940, more than 5 years after the last of the three tax returns were filed. The Trial Judge had judicial notice that the male petitioner Daniel J. Leary along with others was charged in May 1938 in the Connecticut Superior Court with the crime of conspiracy to defraud; that he and others having been convicted, appealed to the Court of Appeals for the State of Connecticut and the conviction previously had was affirmed as to the petitioner Daniel J. Leary and some of the others, 18 Atl. (2d) 895, 127 Conn. 543-606.

It is readily apparent that the attention of the Internal Revenue Bureau was attracted to the petitioners' tax wise from the circumstances and publicity surrounding the trial in the State Court.

On June 7, 1940, even before the Criminal trial of the petitioner Daniel J. Leary, the Commissioner of Internal Revenue sent notices by registered mail to the petitioners in which suggested deficiencies were urged as to tax returns made for the years 1933-4 and 5.

Under Title 26 U.S.C.A. 6213(a) (*supra*) the petitioner taxpayers were privileged to file a petition in the

then Board of Tax Appeals for the United States (now the Tax Court of the United States) for a redetermination of the suggested deficiencies posed by the Commissioner of Internal Revenue.

Complaint in case No. 1707 (App. 22a) in paragraph 6 alleges that the Commissioner did send his notices of deficiencies on June 7, 1940 and in paragraph VI of said complaint (App. 23a) alleged directly and not under *videlecit* that on the 9th day of October 1940 the petitioners filed a petition with the U. S. Board of Tax Appeals for a redetermination of the Commissioner's determination of suggested deficiencies.

Under the provisions of Title 26 U.S.C.A. Section 6213(a) (*supra*) the time within which a petition to the then Board of Tax Appeals could be made was restricted to 90 days after the date of receipt of registered notice. It is notably apparent that October 9, 1940 is more than 90 days after June 7, 1940.

Petitioner did point out also that under Rule 7A(1)(2) of the Rules of the Tax Court of the United States (which were the same on October 9, 1940) the provisions of Title 26 U.S.C.A. Section 6213(a) (*supra*) are listed as a procedural requirement for jurisdiction of the Board of Tax Appeals.

In connection with this subject matter, it is to be noted (App. 9a) under date of January 28, 1963 that Counsel for the petitioners urged to the Court at hearing in the Motion for Summary Judgment that the Board of Tax Appeals had no jurisdiction to hear the case. The Trial Judge on request of the counsel for the respondent granted leave to the respondent to amend complaints and motion within three weeks. It should also be noted that it is disclosed by the Appendix beginning at 5a and ending at 11a of said Appendix, all covering docket entries, that there was no amended complaint or amended motion filed.

It is to be noted however that instead of amending the complaint or motion, the respondent filed exhibits 1 to 9, all of which appear in the record beginning at page 52 to 103 and are evidently documents not intended to assist the Trial Judge in piercing what is sometimes called "the pleading veil" but on the contrary intended to support in an evidentiary way the deficiency assessments that the Commissioner had long ago made.

It is hardly necessary to suggest that these exhibits were filed over the protest of the petitioners and moreover the accepting of same denied due process to the petitioners in the sense that they were not afforded the opportunity to cross-examine the affiants and others involved as such documents attempted to support the allegations of the complaints.

Motion for Summary Judgment should be sustained only where there is no genuine issue as to *any* material fact and the moving party is entitled to a judgment as a matter of law. This pronouncement has been made by the Supreme Court of the United States in *Sartor* v. *Arkansas National Gas Corp.*, 321 U.S. 620, 88 L.ed. 967, 64 S C R 724 and innumerable cases announcing this doctrine as same is annotated under Rule 56 of the Federal Rules of Civil Procedure.

Also well established is the rule that on Motion for Summary Judgment, affidavits filed in their support may be considered for the purpose only of ascertaining whether an issue of fact is presented by the pleadings; but they cannot be used as a basis for deciding the fact issue. See *Campana Corp.* v. *Harrison* (C.C.A. 7), 135 F 2d 334 and many other annotations under item 50 of Annotations to Rule 56.

This Court is also invited to have in mind in the overall consideration of this subject matter that case No. 626 was filed on July 7, 1941, (App. 13a); the complaint in case No. 1707 was filed on April 11, 1946 (App.

25a), and the complaint in 1708 was likewise filed on April 11, 1946 (App. 26a).

Also it is to be borne in mind that the conviction of the petitioner Daniel J. Leary and some others was affirmed in the State Court on March 4, 1941, 18 At (2d) 895, 127 Conn. 543. Immediately following this decision the petitioner Daniel J. Leary left the jurisdiction and the respondent in the face of this situation filed its civil case 626 below on June 3, 1941 and the hearing of the case before the Board of Tax Appeals was not had until November 1944 more than four years after the complaint was filed and the decision of that Board was made on January 24, 1945 as appears in 1945 T. C. Law Decisions at page 112.

In this latter decision (*supra*) page 115 the Tax Court sets forth the fact that nobody appeared on behalf of the petitioner Daniel J. Leary and the Tax Board was advised by counsel for respondent that he had a communication from the record representative of Daniel J. Leary who advised that he had not been able to confer with Mr. Leary and had no documents or other data available to him in order to intelligently represents the subject's interest at the hearing. This representative of the petitioner in that proceeding was not a lawyer but a suggested C.P.A. which type of representation is tolerated by that Board, now called the Tax Court of the United States, although the Supreme Court of the United States since the change of designation has indicated that the organization is still not a court. This demonstrates that the petitioner was not accorded adequate representation as contemplated under Amend 6—U.S. Const.

See:

Old Colony Trust Co. v. *C.I.R.*, 279 U.S. 716, 73 L. Ed. 918;
Page v. *C.I.R.* 297 F (2d) 733;
Taylor v. *C.I.R.*, 258 F (2d) 89.

The Board of Tax Appeals, notwithstanding the absence of Daniel J. Leary, the main taxpayer and his representative, proceeded its hearing on the case and made its decision (1945 T.C. Law Decisions 112).

The requirements of said Board of Tax Appeals then and now should have prompted the Board to dismiss the taxpayer's petition (Rule 7(a)(1)(2), Rule 27(c)(3), and Rule 31(a) and (g) *supra*).

See also respondent's Exhibit 6 as set forth in record pages 82 and 83.

Rule 31(a) of Tax Court Rules (*supra*) makes the procedure accord with Rules of the U.S. District Court of the District of Columbia. Rule 13 of said Court (*supra*) provides for dismissal by the Clerk as does Rule 15 (*supra*) Rules of U.S. District Court for the District of Connecticut for failure to prosecute.

Rule 15 (*supra*) of the U.S. District Court for the District of Connecticut requires Clerk of said Court to give notice of proposed dismissal "on or before the 1st of September in each year."

The docket entries (App. 5a-12a) show no such action as taken by the Clerk.

This Supreme Court should in addition consider the fact that in the light of the above detailed happenings the respondent on June 3, 1941 filed bill of complaint in case 626. Apparently the respondent in the face of the situation at the Board of Tax Appeals then did not feel that it wanted to depend upon the decision of said Board, and therefore filed Civil Case 626.

The respondent again changed its mind on April 11, 1946, five years later and decided that it would ask the District Court for judgment on the basis of the Board of Tax Appeals' decision in Civil Cases Nos. 1707 and 1708.

In 1963, 22 years after the alleged decision by the Board of Tax Appeals the respondent suddenly feels the need of filing a Motion for Summary Judgment instead of placing the matter on the trial calendar.

As indicated in Title 26 U.S.C.A. 6322 (*supra*) there comes a time when a tax liability could become unenforceable by reason of lapse of time and there would appear beyond question that in this instance there has been a *lapse* of time.

The petitioners urge that the effect of the Lower Court granting of Motion for Sumary Judgment has accomplished a forfeiture against the petitioners without due process (U.S. Const. Amendts. 5 and 14).

In the case of *U.S.* v. *Stowell*, 133 U.S. 1, at page 17 10 Sct. 244, 33 L. Ed. 555 the Court said:

> "But the law requires proceedings to be instituted for the purpose of ascertaining the facts of the forfeiture (*Wessels* v. *Beeman*, 87 Mich. 481, 490 (49 N.W. 483), and the inchoate title of the state to the good forfeited is not fully consummated until after judicial condemnation has been had. (*Caldwell* v. *U.S.*, 49 U.S. [8 How.] 366, 381, (12 L.Ed. 1115): *Tracy* v. *Corse*, 58 N.Y. 143, 149)."

In the said *U.S.* v. *Stowell* (*supra*), the Court further observed:

> "By the settled doctrine of this Court, whenever a statute enacts that upon the commission of a certain act, specific property * * * shall be forfeited * * * title is not perfected until judicial condemnation * * *"

In *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914.

> "Here, the Supreme Court held that a 'decree of condemnation * * * without allowing the owner (a confederate) of the property to appear * * * interpose his claim for the property, and answer libel'

was without validity and that such property could not be forfeited when he was not allowed to appear and make answer. The Court said (p. 915):

> "'A different result would be a blot upon our jurisprudence and civilization * * * It would be contrary to the first principles of the social compact and of the right administration of justice'."

In 37 C.J.S. pages 8, 9 cases cited, it is stated:

> "Forfeitures are not favored; they are considered harsh exactions odious and to be avoided when possible—where a liberal construction of a statute will avoid the imposition of a forfeiture, it will be so construed. On the other hand, a statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation.—forfeitures are never to be inferred from doubtful language."

See also: *Rush* v. *U.S.*, 256 F (2d) 862.

This Court's attention is finally directed to that portion of the per curium opinion rendered by the United States Court of Appeals for the Second Circuit at 330 F (2d) 498 reading as follows:

> "The uncontested affidavit of debt discloses that the amounts claimed to be due totaled $420,250.05."

The affidavit therein being referred to by the Appellate Court was an affidavit filed at the continued hearing on the Motion for Summary Judgment (Docket Index page 5a Record United States District Court for the District of Connecticut, this Appendix page (11a).

The petitioners again point out that they had no right to test issues under a Motion for Summary Judgment (*supra*)

This action by the District Court, which the Appellate Court has affirmed, as already indicated by the decisions

(*supra*) does violence to the provisions of Rule 56 Federal Rules of Civil Procedure and the due process provisions of the Fifth and Fourteenth Amendments to the Constitution. The inescapable effect of this action is to accomplish forfeiture against the petitioners as has otherwise been pointed to in cases set forth (*supra*).

CONCLUSION

The premises considered, it is respectfully urged that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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